



DEPARTMENT OF DEFENSE

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Office of the Secretary

32 CFR Part 174

[Docket ID: DOD-2010-OS-0135]

RIN 0790-AI67

Revitalizing Base Closure Communities and Addressing Impacts of Realignment

AGENCY: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

ACTION: Final rule.

SUMMARY: Section 2715 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84, amended the Defense Base Closure and Realignment Act of 1990 to change the authority of the Department of Defense to convey property to a local redevelopment authority (LRA) for purposes of job generation on a military installation closed or realigned under a base closure law. Such a conveyance is known as an Economic Development Conveyance (EDC). Economic Development Conveyances were created by amendments to the Base Closure and Realignment law in 1993, creating a new tool for communities experiencing negative economic effects caused by the elimination of a significant number of jobs in the community. Congress recognized that the existing authority under the Federal Property and Administrative Services Act of 1949 (as amended and otherwise known as the Real Property Act) was not structured to deal with the unique challenges of assisting base closure communities with economic recovery and job creation, many with decaying or obsolete infrastructure and other redevelopment challenges. Under this revised authority, the Department is no longer required to seek fair market value for an EDC. An EDC may be for consideration at or below the estimated fair

market value, including without consideration. The amendment expands the flexibility of the Department regarding the form of consideration it may accept, including the authority to accept consideration in the form of revenue sharing or so-called "back-end" funding. Back-end funding is consideration consisting of a share of the revenues that the LRA receives from third-party buyers or lessees from sales and leases of the conveyed property, consideration in kind (including goods and services), real property and improvements, or such other consideration as the Secretary considers appropriate.

The amendment also provides that the Department's determination of the consideration may account for the economic conditions of the local affected community and the estimated costs to redevelop the property.

This final rule amends the existing regulation on reutilization of installations closed under the base closure process to conform to the amendment to the Defense Base Closure and Realignment Act of 1990 and makes other improvements that encourage expedited property transfers for job creation that allow for the Department to recover a share of the revenues obtained.

EFFECTIVE DATE: This final rule is effective [INSERT 30-DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert Hertzfeld, (703) 604-6020.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

This final rule implements statutory changes and enables the military departments to expedite the EDC process. Closed military bases represent a potential engine of economic activity and job creation for the local affected communities. When disposing of property using

an EDC, the military departments should use the full breadth of their authority to structure conveyances that respond to the job creation and redevelopment challenges of the individual community.

The amended law no longer requires the Department to seek fair market value when conveying property to eligible recipients. Accordingly, a transfer may be made below estimated fair market value or without consideration if the LRA agrees to reinvest sale or lease proceeds for not less than seven years and to take title to the property within a reasonable timeframe. This rule also amends the regulation to delete the requirement for the Department to obtain an appraisal of the property as part of an EDC conveyance, and instead allows the military departments to conduct the type of analysis it deems appropriate to protect the interest of the Government and to make an informed decision. The analysis should be based on the uses identified in the community reuse plan, rather than an independent analysis of highest and best use. This regulation emphasizes the use of EDCs to best promote the economic redevelopment of the former installation. With this change, the Department has the option to pursue property value by obtaining a share of the revenues obtained from the redevelopment of the property. Experience has shown that estimates of fair market value for property at closing installations, especially those requiring substantial future investment in redevelopment, can vary widely due to the uncertainties inherent in significant long-term redevelopment projects and different projections of costs and revenues over a potential 20-30 year development cycle that may occur on a large closing installation. Elimination of the requirement to estimate the fair market value, along with related appraisal requirements, should expedite the conveyance process and remove what has been a common source of conflict and delay between the community and the Department. Accordingly, the final rule establishes as DoD policy a requirement that, for every

EDC, the LRA must reinvest sale or lease proceeds for at least seven years after transfer and take title to the property within a reasonable timeframe. This makes the determination of fair market value of the property unnecessary for purposes of establishing EDC terms and conditions. It also eliminates the need to establish a process by which the fair market value of property to be conveyed by EDC must be determined. The final rule does allow the Secretary concerned to obtain and use any information deemed appropriate, which may include economic and market analysis, construction estimates, a r pro forma cash flow analysis, and appraisals, to ensure that decisions regarding property disposal are properly informed. If the proposed conveyance does not meet the requirements for an EDC, or if the LRA does not agree to reinvest sale or lease proceeds for at least seven years and to take title to the property within a reasonable timeframe, the Secretary concerned may pursue a negotiated sale to a public entity at fair market value, including a negotiated sale for economic development purposes, under regulations at 41 CFR Part 102-75.880, et seq, or competitive public sale.

This rule streamlines the disposal process by separating the eligibility criteria for an EDC from the criteria guiding the negotiation of the terms and conditions. It also makes the application more concise and incorporates adjustments to reflect current market conditions and to recognize local community investment and risk. This final rule implements the revised EDC authority in a manner intended to clarify and streamline the Economic Development Conveyance process and assist affected communities in job generation. As explained below in the response to public comments, additional changes have been made to address those comments and to better clarify the Department's intent.

PUBLIC COMMENTS

The Department of Defense published a proposed rule on December 17, 2010 (75 FR 78946) and received comments from four individuals/organizations. All comments were generally supportive of the revised regulation, particularly the increased flexibility and promotion of community reuse and redevelopment efforts. Following is a summary of the individual comments and the Department's responses.

Comment: One comment addressed the reporting requirements contained in paragraph 174.9(d)(8); specifically the requirement to maintain separate reinvestment reporting requirements for each transfer when property is transferred in phases. The person making the comment thought that this proposed requirement would result in a "difficult, expensive and time consuming process for both local jurisdiction and the Department". The commenter suggested that the reporting requirement should be at least seven years from the date of the initial transfer.

Response: The Department agrees that, as proposed, the requirement for keeping track of separate reporting timelines for individual parcels conveyed would create a confusing and burdensome requirement. The Department thinks a simple solution to meet the congressional intent of the reinvestment requirement is to have the reinvestment requirement extend for at least seven years after the last transfer. This requirement should simplify the process and ensure that funds are dedicated to the redevelopment of the former installation to promote its successful redevelopment. The Department recognizes that some parcels may have beneficial use transferred before physical title through the use of a lease in furtherance of conveyance, and the final rule treats such property as a transfer for determining the start of the reinvestment period. The rule has been changed accordingly.

Comment: One comment addressed the requirement contained in paragraph 174.9(d)(9) that requires the Local Redevelopment Authority to accept control of the property within a reasonable time after the date of the property disposal record of decision. The commenter was concerned that this requirement does not fully address the circumstances of the transfer and asks the Department to add “under the circumstances” after “in a reasonable time”. Response: The Department does not believe a change is necessary. It is assumed that all parties act reasonably with regard to the individual facts and circumstances of each property. The property will only be ready for transfer after a property disposal record of decision is issued. No change was made to the rule to address this comment.

Comment: One comment was very supportive of the removal of the requirement to conduct an appraisal in all circumstances and was generally supportive of the language contained in paragraph 174.9(k) which provides that the consideration should be based on a business plan and development pro forma that assumes the uses in the redevelopment plan. The commenter suggests that the basis of consideration should be required to be a business plan and development pro forma. This would be accomplished by changing the word “should” to “shall”.

Response: The Department believes that the military departments should have the flexibility to treat each EDC application on an individual basis and create a transaction that is both fair to the Government and to the local community. For most large redevelopment projects, the basis of consideration needs to be a business plan and development pro forma due to the uncertainties inherent in large, long term redevelopment projects. Not all properties subject to this regulation are large, long term redevelopment projects and the Department needs to maintain flexibility for differing circumstances. The use of the word “should” maintains needed flexibility, but denotes

a policy preference for use in most circumstances. No change in the final rule was made to address this comment.

Comment: One comment expressed concern over the inclusion of environmental clean-up savings when evaluating an EDC application, as provided for in paragraph 174.9(f)(8). The commenter thought that consideration of this factor would transfer the burden of clean-up costs to the local community.

Response: Paragraph 174.9(f)(8) does not transfer clean-up costs to local communities. The Department retains the responsibility for environmental restoration to meet all applicable standards. This paragraph allows the Department to take into account the benefit of phasing clean-up schedules with planned reuse when negotiating the consideration paid by the Local Redevelopment Authority. No change was made in the final rule to address this comment.

Comment: One comment raised a concern about complying with the provisions of the McKinney Act with regard to the needs of the homeless as part of a community economic development strategy.

Response: The Base Closure Community Redevelopment and Homeless Assistance Act exempted Base Closure communities from the McKinney Act and substituted an alternative process for evaluating the needs of the homeless in the base property disposal process. This rule only effects Local Redevelopment Authorities that have already complied with the requirements of the Base Closure Community Redevelopment and Homeless Assistance Act, since a requirement of making an EDC application is an approved redevelopment plan. No change was made to the final rule to address this comment.

II. REGULATORY PROCEDURES

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

It has been certified that 32 CFR part 174 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”

It has been certified that 32 CFR part 174 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

It has been certified that 32 CFR part 174 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 174 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

It has been certified that 32 CFR part 174 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 174:

Community development; Government employees; Military personnel; Surplus Government property.

Accordingly, 32 CFR Part 174 is amended as follows:

PART 174--[AMENDED]

1. The authority citation for Part 174 continues to read as follows:

Authority: 10 U.S.C. 113 and 10 U.S.C. 2687 *note*.

2. Section 174.9 is revised to read as follows:

§ 174.9 Economic development conveyances.

- (a) The Secretary concerned may transfer real property and personal property to the LRA for purposes of job generation on the former installation. Such a transfer is an Economic Development Conveyance (EDC).
- (b) An LRA is the only entity eligible to receive property under an EDC.
- (c) The Secretary concerned shall use the completed application, along with other relevant information, to decide whether to enter into an EDC with an LRA. An LRA may submit an EDC application only after it adopts a redevelopment plan. The Secretary concerned shall establish a reasonable time period for submission of an EDC application after consultation with the LRA.

(d) The application shall include:

(1) A copy of the adopted redevelopment plan.

(2) A project narrative including the following:

(i) A general description of the property requested.

(ii) A description of the intended uses.

(iii) A description of the economic impact of closure or realignment on the local community.

(iv) A description of the economic condition of the community and the prospects for redevelopment of the property.

(v) A statement of how the EDC is consistent with the overall redevelopment plan.

(3) A description of how the EDC will contribute to short- and long-term job generation on the installation, including the projected number and type of new jobs it will assist in generating.

(4) A business/operational plan for development of the EDC parcel, including at least the following elements:

(i) A development timetable, phasing schedule, and cash flow analysis.

(ii) A market and financial feasibility analysis describing the economic viability of the project, including an estimate of net proceeds over the planned life of the redevelopment project, but in no event for less than fifteen years after the initial transfer of property, and the proposed consideration or payment to the Department of Defense. The proposed consideration should describe the methodology for payment and include draft documents or instruments proposed to secure such payment.

(iii) A cost estimate and justification for infrastructure and other investments needed for redevelopment of the EDC parcel.

(iv) A proposed local investment and financing plan for the development.

(5) A statement describing why an EDC will more effectively enable achievement of the job generation objectives of the redevelopment plan regarding the parcel requested for conveyance than other federal real property disposal authorities.

(6) Evidence of the LRA's legal authority to acquire and dispose of the property.

(7) Evidence that:

(i) The LRA has authority to perform the actions required of it, pursuant to the terms of the EDC, and

(ii) That the officers submitting the application and making the representations contained therein on behalf of the LRA have the authority to do so.

(8) A commitment from the LRA that the proceeds from any sale or lease of the EDC parcel (or any portion thereof) received by the LRA during at least the first seven years after the date of the initial transfer of property, except proceeds that are used to pay consideration to the Secretary concerned under paragraph (h) of this section, shall be used to support economic redevelopment of, or related to, the installation. In the case of phased transfers, the Secretary concerned shall require that this commitment apply during at least the first seven years after the date of the last transfer of property to the LRA. For the purposes of calculating this reinvestment period, a lease in furtherance of conveyance shall constitute a transfer. The use of proceeds to pay for, or offset the costs of, public investment on or related to the installation for any of the following purposes shall be considered a use to support the economic redevelopment of, or related to, the installation—

(i) Road construction;

(ii) Transportation management facilities;

- (iii) Storm and sanitary sewer construction;
- (iv) Police and fire protection facilities and other public facilities;
- (v) Utility construction;
- (vi) Building rehabilitation;
- (vii) Historic property preservation;
- (viii) Pollution prevention equipment or facilities;
- (vix) Demolition;
- (x) Disposal of hazardous materials and hazardous waste generated by demolition;
- (xi) Landscaping, grading, and other site or public improvements; and
- (xii) Planning for or the marketing of the development and reuse of the installation.

(9) A commitment from the LRA to execute the agreement for transfer of the property and accept control of the property within a reasonable time, as determined by the Secretary concerned after consultation with the LRA, after the date of the property disposal record of decision. The determination of reasonable time should take account of the ability of the Secretary concerned to provide the deed covenants, or covenant deferral, provided for under section 120(h)(3) and (4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)(3) and (4)).

(e) The Secretary concerned shall review the application and, to the extent practicable, provide a preliminary determination within 30 days of receipt as to whether the Military Department can accept the application for negotiation of terms and conditions, subject to the following findings:

(1) The LRA submitting the application has been duly recognized by the DoD Office of Economic Adjustment;

(2) The application is complete. With respect to the elements of the application specified in paragraph (d)(6) and (d)(7)(i) of this section, the Secretary concerned may accept the application for negotiation of terms and conditions without this element, provided the Secretary concerned is satisfied that the LRA has a reasonable plan in place to provide the element prior to transfer of the property; and

(3) The proposed EDC will more effectively enable achievement of the job generation objectives of the redevelopment plan regarding the parcel requested than the application of other federal real property disposal authorities.

(f) Upon acceptance of an EDC application, the Secretary concerned shall determine if the proposed terms and conditions are fair and reasonable. The Secretary concerned may propose and negotiate any alternative terms or conditions that the Secretary considers necessary. The following factors shall be considered, as appropriate, in evaluating the terms and conditions of the proposed transfer, including price, time of payment, and other relevant methods of compensation to the Federal government:

(1) Local economic conditions and adverse impact of closure or realignment on the region and potential for economic recovery through an EDC.

(2) Extent of short- and long-term job generation.

(3) Consistency with the entire redevelopment plan.

(4) Financial feasibility of the development and proposed consideration, including financial and market analysis and the need and extent of proposed infrastructure and other investments.

(5) Extent of state and local investment, level of risk incurred, and the LRA's ability to implement the redevelopment plan. Higher risk assumed and investment made by the LRA

should be recognized with more favorable terms and conditions, to encourage local investment to support job generation.

(6) Current local and regional real estate market conditions, including market demand for the property.

(7) Incorporation of other Federal agency interests and concerns, including the applicability of other Federal surplus property disposal authorities.

(8) Economic benefit to the Federal Government, including protection and maintenance cost savings, environmental clean-up savings, and anticipated consideration from the transfer.

(9) Compliance with applicable Federal, state, interstate, and local laws and regulations.

(g) The Secretary concerned shall negotiate the terms and conditions of each transaction with the LRA. The Secretary concerned shall have the discretion and flexibility to enter into agreements that specify the form of payment and the schedule.

(h)(1) The Secretary concerned may accept, as consideration, any combination of the following:

(i) Cash, including a share of the revenues that the local redevelopment authority receives from third-party buyers or lessees from sales and leases of the conveyed property (i.e., a share of the revenues generated from the redevelopment project);

(ii) Goods and services;

(iii) Real property and improvements; and

(iv) Such other consideration as the Secretary considers appropriate.

(2) The consideration may be accepted over time.

(3) All cash consideration for property at a military installation where the date of approval of closure or realignment is before January 1, 2005, shall be deposited in the account established under Section 2906(a) of the Defense Base Closure and Realignment Act of 1990 (part A of title

XXIX of Public Law 101-510; 10 U.S.C. 2687 note). All cash consideration for property at a military installation where the date of approval of closure or realignment is after January 1, 2005, shall be deposited in the account established under Section 2906A(a) of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(4) The Secretary concerned may use in-kind consideration received from an LRA at any location under control of the Secretary concerned.

(i) The LRA and the Secretary concerned may agree on a schedule for sale of parcels and payment participation.

(j) Additional provisions shall be incorporated in the conveyance documents to protect the Department's interest in obtaining the agreed upon consideration, which may include such items as predetermined release prices, accounting standards, or other appropriate clauses designed to ensure payment and protect against fraudulent transactions. Every agreement for an EDC shall contain provisions allowing the Secretary concerned to recoup from the LRA such portion of the proceeds from a sale or lease by the LRA as the Secretary concerned determines appropriate if the LRA does not use the proceeds to support economic redevelopment of or related to the installation during the period specified in paragraph (d)(8) of this section. The Secretary concerned and an LRA may enter into a mutually agreed participation agreement which may include input by the Secretary concerned on the LRA's disposal of EDC parcels.

(k) The Secretary concerned should take account of property value but is not required to formally determine the estimated fair market value of the property for any EDC. The consideration negotiated should be based on a business plan and development pro-forma that assumes the uses in the redevelopment plan. The Secretary concerned may determine the nature and extent of any

additional information needed for purposes of an informed negotiation. This may include, but is not limited to, an economic and market analysis, construction estimates, a real estate pro forma analysis, or an appraisal. To the extent not prohibited by law, information used should be shared with the LRA.

(l) After evaluating the application based upon the criteria specified in paragraph (f) of this section, and negotiating terms and conditions, the Secretary concerned shall present the proposed EDC to the Deputy Under Secretary of Defense (Installations and Environment) for formal coordination before announcing approval of the application.

§ 174.10 [Removed and Reserved]

3. Section 174.10 is removed and reserved.

Dated: November 10, 2011.

Aaron Siegel,
Alternate OSD Federal Register Liaison Officer,
Department of Defense.

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